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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 489

ARNOLD VAN DEN WYMELENBERG, AS EXECUTOR OF THE ESTATE OF ELEANOR VAN DEN WYMELENBERG,

Plaintiff-Petitioner,

AND

ARNOLD VAN DEN WYMELENBERG,

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROGER C. MINAHAN,
2100 Marine Plaza,
Milwaukee, Wisconsin 53202,
Attorney for the Petitioner.

E. L. EVERSON,
414 E. Walnut Street,
Green Bay, Wisconsin 54301,
Of Counsel for Petitioner.

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Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of said Court of Appeals entered in the above entitled cases on June 19, 1968.

OPINIONS BELOW.

The original decision, written by the Honorable Myron Gordon, Judge of the United States District Court for the Eastern District of Wisconsin is reported in 272 Fed. Supp. 571. The opinion of the District Judge also appears at page 14 of the plaintiffs' Appendix in the Court of Appeals, certified and filed in this Court as a part of the transcript of the record. References to such Appendix will hereinafter be referred to as (App. ....).

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court is reported in ..... Fed. 2nd. ....., and is also set forth in the Appendix to this Petition.

JURISDICTION.

The date of the judgment sought to be reviewed is June 19, 1968; the date of entry is the same.

This is a suit for refund of Gift Taxes paid by plaintiffs-petitioners, and the jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254 (1) and Section 2101(c).

Grounds for invoking the jurisdiction of this Court are that the decision of the Court of Appeals in this case is in conflict with decisions of the United States Courts of Appeal in the Fourth and Ninth Circuits.

QUESTIONS FOR REVIEW.

1. Where, through mistake of scrivener, Trust Agreement executed by Plaintiff-Donors failed to contain certain provisions which Plaintiffs had directed to be included in it, and Plaintiffs signed the instrument in belief that it contained such provisions, and, upon discovery of mistake,

executed a "Corrected Trust Agreement," which conformed in its terms to their actual intent at time of execution of first instrument, should Plaintiffs' liability for gift taxes on gifts to minor grandchildren be determined under the provisions of the "Corrected Trust Agreement" or under the provisions of the initial agreement executed by Plaintiffs under a mistake of fact as to the contents of the instrument?

2. Were gifts in trust of net income from rental real estate which Trustee was required to distribute annually to Plaintiffs' minor grandchildren until they reached the age of twenty-one years gifts of present interests the value of which was reasonably determinable so as to entitle Plaintiffs to apply Gift Tax Exclusions to the value of such interests?

STATUTES AND REGULATIONS INVOLVED.

SEC. 2503, *Taxable Gifts.*

(b) Exclusions From Gifts.—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1955 and subsequent calendar years, the first $3,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection, if no part of such interest will at any time pass to any other person.

(c) Transfer for the Benefit of Minor.—No part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property for purposes of subsection (b) if the property and the income therefrom—

(1) may be expended by, or for the benefit of,

the donee before his attaining the age of 21 years, and

(2) will to the extent not so expended—

(A) pass to the donee on his attaining the age of 21 years, and

(B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514 (c).

Reg. 25.2512-5 (TD 6334, filed 11-14-58) Valuation of annuities, life estates, terms for years, remainders and reversions—

(a) In general. (1) The fair market value of annuities, life estates, terms for years, remainders and reversions is their present value, determined under this section, ****.

(c) Life estates and terms for years. **** If the interest to be valued is the right to receive income of property or to use nonincome-producing property for a term of years, column 3 of Table II is used.

STATEMENT OF MATERIAL FACTS.

These actions were brought to recover gift taxes which Appellants claim were erroneously assessed and collected with respect to gifts in trust to their twelve (12) minor grandchildren.

The material facts which we here set forth were either stipulated (See Stipulations of Fact at App. 4 and App. 13), or were established without dispute by the depositions of John H. Evans, Arnold, Eleanor, and John Van Den Wymelenberg, hereinafter "Van"), received in evidence at the trial.

These material facts are as follows:

Several months before July 6, 1961, the date of execution of the trust agreement initially executed by the Plaintiffs

(App. 6), the Plaintiffs had consulted their accountant, John H. Evans, and their legal counsel, E. L. Everson, with respect to the desirability of making a gift in trust to their twelve (12) minor grandchildren of a piece of real estate which Plaintiff Arnold Van was then negotiating to purchase. In their initial conferences with the accountant and legal counsel, Plaintiffs' thoughts ran toward the idea that the property should be kept in trust for a period of years, fifteen (15) or twenty (20), which would mean as to most of the grandchildren the corpus would not vest until they were past twenty-one (21) years of age; also, their initial thoughts were that the income ought not to be distributed annually, but should be permitted to accumulate until the vesting of the corpus; also, that in the event of the death of a beneficiary before vesting, its share in the corpus and income would go to its siblings and also that the trustee would have no power to invade the corpus at any time or for any purpose.

A tentative draft of a trust instrument incorporating these initial ideas was prepared as a basis for further discussions between the Plaintiffs, their son, John Van, who acted as their financial advisor, and their accountant and legal counsel.

In these subsequent discussions it was pointed out to the Plaintiffs by their advisors that in order to qualify the trust for annual gift tax exclusions, these initial ideas would have to be modified. They were specifically advised that in order to comply with the provisions of Section 2503 (c) of the 1954 Internal Revenue Code the trust agreement would have to provide, (1), for vesting of the corpus at age 21, (2) for actual distribution at least annually of the net income, (3) for at least a discretionary power in the trustee to invade the corpus for the reasonable needs of the beneficiaries; and, (4) for the right in the beneficiaries to dispose of their interests by will.

It was of major importance to the Plaintiffs that the Federal Gift Taxes on these contemplated gifts should be avoided. Therefore, after they had considered the advice of their accountant and legal counsel, they decided to change their original ideas in all four of these respects.

In the meantime, the negotiations for purchase of the real property were going on, and by June 29, 1961 had progressed to the point where Plaintiff Arnold Van had reached an agreement to purchase, and had made a down-payment on the purchase price.

On that same date a meeting took place between Plaintiff Arnold Van, his son, John, the accountant, John H. Evans, and Plaintiffs' legal counsel, E. L. Everson, at which Plaintiff Arnold Van specifically directed Attorney Everson to make such changes in the initial draft of the trust agreement as would be necessary to conform the final draft to the four requirements of Section 2503 (c) which had been the subjects of their previous discussions.

On July 6, 1961, Arnold Van acquired title to the real property for a cash consideration of $50,000 subject to a mortgage of $82,500 which he assumed and agreed to pay. Immediately thereafter, on that same day, he executed the Trust Agreement (App. 6), believing that it then contained the revisions which had been agreed upon at the conference of June 29, 1961. At the same time he deeded the real property to the trustee, Ruth Merkey, his daughter. His wife, Eleanor, joined in the gift for the purpose of doubling the gift tax exclusion. She also executed the trust agreement as a donor, then believing as he did that it contained the provisions necessary to qualify the gift for annual exclusion as required by Section 2503 (c). Neither Plaintiff fully read the Trust Agreement before they signed it, but relied on the belief that Counsel had made the necessary revisions in the preliminary draft, as he had been instructed to do at the conference a week before.

On April 14, 1962, Plaintiffs duly filed Gift Tax Returns listing gifts in trust to the twelve grandchildren under the Trust Agreement of July 6, 1961, in the aggregate value of $50,000, in equal shares of $4,166.67 to each grandchild. In these returns each spouse consented that their gifts be treated as having been made one-half by each, thus making a $6,000 annual exclusion available for each gift which qualified for an annual exclusion. This exclusion was claimed for each of the gifts to the grandchildren, so that the returns showed that no tax was payable. The District Director of Internal Revenue, Milwaukee, with whom the returns were filed was provided with a copy of the Trust Agreement.

On or about September 10, 1963, the Plaintiffs were notified by the Director that he proposed to disallow the exclusions for the reason that the gifts were future interests which did not qualify for exclusion under Section 2503 (c). It was then discovered for the first time that in preparing the revised draft which was executed on July 6, 1961, a mistake had been made in the office of Plaintiffs' legal counsel in revising paragraphs four and five of the initial working draft, and that as a result of this mistake the executed instrument failed to include the changes previously agreed upon with respect to invasion of corpus and a beneficiary's right to dispose of his interest by will.

Upon discovery of the mistake a "Corrected Trust Agreement" incorporating the intended revisions to paragraphs four and five was immediately prepared an executed, *nunc pro tunc* as of July 6, 1961, by the signatories to the original instrument. A copy of the "Corrected Trust Agreement" with a statement that the original had been executed through a mistake of fact as to certain of its provisions was filed with the Director on September 25,

1963, as part of a written protest against the proposed deficiency assessments.

The Director disallowed the protests, and on July 31, 1964 assessed deficiencies of $4,968.51 against Arnold Van and $4,653.51 against Eleanor Van. These assessments with interest, totaling $5,652.33, and $5,293.97, respectively, were paid on August 10, 1964.

Claims for refund were filed on September 22, 1964, and on March 2, 1965 Plaintiffs were notified that the claims had been disallowed.

It has been stipulated that the actual net income from the trust during the first four years of its operation totaled $11,659.72; or an average of $242.00 per year distributed annually to each beneficiary.

United States District Court had jurisdiction of the cases under the provisions of 28 U. S. Code Section 1346 (a), (1).

REASONS FOR GRANTING THE WRIT.

I. With respect to the first question (*supra*) which this Court is asked to review, there is an essential conflict between the decision of the Court of Appeals for the Seventh Circuit in these cases and the decision of the Court of Appeals for the Ninth Circuit in the case of *Flitcroft* v. *Commissioner*, 382 Fed. 2nd 499 (1964).

In the present case the Seventh Circuit has held that a trust agreement executed under a mistake of fact as to the provisions it contained cannot thereafter be reformed in any manner or by any means so as to affect the Federal tax consequences which would result from execution in its original form.

In the *Flitcroft* case the Ninth Circuit has held that a trust agreement from which an intended provision was inadvertently omitted may be reformed with such effect

as to eliminate liability for Federal taxes otherwise assessable under the terms of the initial agreement.

We respectfully submit that this question warrants consideration by this Court in order that the essential conflict between these decisions may be finally resolved.

II. With respect to the second question (*supra*), which this Court is asked to review, there is an essential conflict between the decision of the Court of Appeals for the Seventh Circuit in these cases and the decision of the Court of Appeals for the Fourth Circuit in the case of *Rosen* v. *Commissioner*, ___ Fed. 2nd page ____ (1968), which, incidentally was handed down on June 14, 1968, just five days before the decision in the present case.

In the present case, the Seventh Circuit has held that the taxpayers were not entitled to allowance of annual exclusions with respect to the present value of the income interests given to their grandchildren because the broad powers conferred upon the trustee made speculative the extent to which income might be produced in the future; hence, the present value of the income right could not be ascertained; and since the present value could not be determined, no exclusion could be allowed.

In the *Rosen* case the Fourth Circuit has held that even where the nature of the corpus was such that at the time of the gift it was presently producing no income at all, with no reason to expect that it would do so in the future, that the taxpayers were entitled to allowance of the annual exclusions. The Fourth Circuit held that in such situations, where no better standard was available, the present value was to be determined by resort to the actuarial tables in Gift Tax Regulation, Section 25.2512.

The conflict in these decisions presents a question of major importance with respect to the availability of annual exclusions for all gifts in trust of present interests in

future income. It may also affect both for gift tax and estate tax purposes, the allowance of charitable deductions for gifts or bequests of present interests in future income and of charitable remainders.

We submit that the uncertainty resulting from these clearly contradictory decisions is a matter of great concern both to Government and to taxpayer, and that it calls imperatively for early resolution by this Court.

CONCLUSION.

In view of the foregoing it is respectfully requested that a Writ of Certiorari issued to the United States Circuit Court of Appeals for the Seventh Circuit to review its decision entered June 19, 1968, affirming the judgment in these cases of the United States District Court for the Eastern District of Wisconsin.

Respectfully submitted,

ROGER C. MINAHAN,
2100 Marine Plaza,
Milwaukee, Wisconsin 53202,
Attorney for the Petitioner.

E. L. EVERSON,
414 E. Walnut Street,
Green Bay, Wisconsin 54301,
Of Counsel for Petitioner.

Dated: August 29, 1968.